No. 14751

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE TONY STARKOVICH,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE GEORGE H. BOLDT, *Judge*

BRIEF OF APPELLEE

CHARLES P. MORIARTY
United States Attorney
RICHARD D. HARRIS
Assistant United States Attorney
Attorneys for Appellee

Office and Post Office Address:
1012 United States Court House
Seattle 4, Washington

BALLARD NEWS, SEATTLE, WASHINGTON — 8/3/1955 — 45 COPIES

No. 14751

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE TONY STARKOVICH,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE GEORGE H. BOLDT, *Judge*

BRIEF OF APPELLEE

CHARLES P. MORIARTY
United States Attorney
RICHARD D. HARRIS
Assistant United States Attorney
Attorneys for Appellee

Office and Post Office Address:
1012 United States Court House
Seattle 4, Washington

BALLARD NEWS, SEATTLE, WASHINGTON — 8/3/1955 — 45 COPIES

INDEX

Page

JURISDICTION 1

STATEMENT OF THE CASE 1

ARGUMENT 3

CONCLUSION 21

CASES CITED

Alexander v. United States, 181 F. 2d 480 11

Bart v. United States, 349 U.S. 219 ..... 15, 18

Blau v. United States, 340 U.S. 159 14

Brown v. Walker, 161 U.S. 591 15

In re *Chapman,* 166 U.S. 661 4

Doran v. United States, 181 F. 2d 489 13

Emspak v. United States, 349 U.S. 190 ..... 6, 8, 15

Healey v. United States, 186 F. 2d 164 11

Heike v. United States, 227 U.S. 131 15

Hoffman v. United States, 341 U.S. 479 13

Kasinowitz v. United States, 181 F. 2d 632 12

In re *Lemon,* 59 P. 2d 213 (Cal. 1936) 9

Mason v. United States, 244 U.S. 362 14

Quinn v. United States, 349 U.S. 155, 203 F. 2d 20 .. 4, 15, 16

Rogers v. United States, 340 U.S. 367 15

United States v. Burr, 25 Fed. Cas. 38 19

STATUTES CITED

United States Code, Title 2, Section 192 3

TEXT BOOKS

Page

Wigmore, Vol. 8, Evidence, p. 317 20

No. 14751

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE TONY STARKOVICH,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE GEORGE H. BOLDT, *Judge*

BRIEF OF APPELLEE

JURISDICTION

The appellee adopts the statement of jurisdiction set forth in the appellant's brief.

STATEMENT OF THE CASE

The statement of facts in the appellant's brief is rather limited and for that reason the appellee

deems it necessary to outline the facts in more detail.

The appellant, with the permission of the Court, is proceeding with a typewritten record, therefore, it may be necessary for convenience sake to set forth more quotations from the evidence than would be required if there were a printed record.

The appellant appeared pursuant to a valid subpoena on June 16, 1954 at Seattle, Washington before the Committee on Un-American Activities of the House of Representatives. All of his testimony before said committee appears in Plaintiff's Exhibit 1, commencing on page 4 to page 15.

The appellant was asked questions and having refused to answer certain of them, he was held in contempt of the House of Representatives of the United States. Thereafter the United States Attorney in the Western District of Washington was directed by the Speaker of the House to proceed according to law. The matter was presented to a grand jury and an indictment in six counts was returned. On motion by the appellant prior to trial, Count VI was dismissed by the court. The case went to trial on March 14, 1955. Only one witness testified, he was Mr. Tavenner, Counsel for the committee. After the jury was selected, the appellant wished the trial court to rule on the questions of pertinency and claim of privilege

in the absence of the jury. This was done and the court, after hearing testimony and argument, dismissed Counts II, III, IV and V. Thereafter, trial was had before the jury on Count I. The appellant did not testify and a verdict of guilty was returned on March 15, 1955. On March 25, 1955, the appellant was sentenced to six months imprisonment and fined $250.00 on Count I. Notice of appeal was timely filed together with a Statement of Points to be Relied Upon on Appeal which consisted of eight separate points. However, in appellant's brief, only one point is presented to this court for determination and that relates only to the claim of privilege. The appellee, therefore, will confine its brief to answering that argument only as it is deemed that the appellant has waived the remaining points by failing to argue them.

ARGUMENT

The appellant was tried and convicted in district court upon a charge of violating the provisions of Title 2, U.S.C. Section 192 which provides:

> § 192. Refusal of witness to testify. Every person who having been summoned as a witness by the authority of either House of Congress, to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses

> to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100, and imprisonment in a common jail for not less than one month nor more than twelve months.

The above section is derived from the Act of January 24, 1857, 11 Stat. 155, amended 12 Stat. 333, and 52 Stat. 942. Except for immaterial changes and additions, this section is substantially the same as the original Act. The first indictment under the Act was in 1894 (In re *Chapman*, 166 U.S. 661). Merely for historical interest, 113 citations for contempt were voted by Congress during the years 1857 to 1949, while in the period of 1950 to June 1952, 117 citations were voted. *(Quinn v. United States*, 203 F. 2d 20, 37, C.A. D.C.).

The appellee asserts that no material errors of law occurred and that the evidence supports beyond a reasonable doubt the conviction on Count I wherein the appellant refused to answer the following question:

> "How soon after that (referred to the period in which he lived in Bellingham) was it that you moved to Seattle?"

That the appellant refused to answer said question on the following basis:

> "In answer to that question, because one question leads to another, I am going to invoke, under

> my privileges not to testify against myself, the fifth amendment in refusing to answer that question."

Said claim of privilege was not a valid ground for the appellant's refusal to answer the question.

It should be pointed out that appellant, immediately after the question was asked and prior to stating the grounds for refusal indicated above, expressed the following which appears at the bottom of page 5, Plaintiff's Exhibit 1:

> "Mr. Starkovich: *I don't remember.* I will discuss that with my attorney, too. (Italics supplied) (At this point Mr. Starkovich conferred with Mr. Hatten.)"

By way of explanation Mr. Hatten, an attorney, was counsel for the appellant during the Committee hearing on June 16, 1954. The above quotation is pointed up to show that the appellant's refusal was not claimed on a basis that his answer would incriminate him, because if we view the record of his testimony, he didn't remember the answer to the question contained in Count I, or at least he so stated. Failure to remember the answer to a question is not grounds for invoking the privilege under the Fifth Amendment of the Constitution.

The appellant refused to answer said question on his claim of privilege under the Fifth Amendment

as indicated by the following which appears at the top of page 6 in Plaintiff's Exhibit 1:

> "Mr. Starkovich: Have you placed a question before me?"
>
> Mr. Velde: I am directing you to answer, having given you that advice.
>
> (At this point Mr. Starkovich conferred with Mr. Hatten.)
>
> Mr. Starkovich: Again I want to state that it is a violation of my rights under the American Constitution in asking that question, and I am going to refuse under my privileges, under my privileges not to testify against myself, invoking the fifth amendment."

Appellant only raises the question as to privilege. The standard to be guided by was announced in *Emspak v. United States*, 349 U.S. 190, at p. 197:

> * * * The protection of the Self-Incrimination Clause is not limited to admissions that "would subject (a witness) to criminal prosecution"; for this Court has repeatedly held that, "Whether such admissions by themselves would support a conviction under a criminal statute is immaterial" and that the privilege also extends to admissions that may only tend to incriminate. (The Court cites *Blau v. United States*, 340 U.S. 159, 161; *Hoffman v. United States*, 341 U.S. 479, at 486-487; *United States v. Burr*, 25 Fed. Cas. at 40-41, No. 14,692e.)

From the question itself, together with all the evidence in the case, there is not the slightest suspicion that an answer to the question in Count I would

"tend to incriminate." In passing it may be noted that appellant's departure from Bellingham was not knowledge personal to himself alone, for it must have been known to many others in the community, and it is inconceivable that an answer would have incriminated him. Neither does the appellant argue in his brief how an answer to *that* question could tend to incriminate appellant, except to guess that to pin-point the date of moving to Seattle might further identify appellant as a Communist.

The appellant gave the following answers to certain questions prior to being asked the question in Count I:

> Mr. Tavenner: Where do you now reside?
>
> Mr. Starkovich: I will find out my legal rights on that from my attorney. (At this point Mr. Starkovich conferred with Mr. Hatten.)
>
> Mr. Starkovich: If I remember my subpoena correctly, my address was on that, which you have because you sent it to me; and, further than that, I will say I live in Seattle, Washington. I protest answering this question any further.
>
> Mr. Tavenner: How long have you lived in Seattle, Washington?
>
> Mr. Starkovich: I will discuss that point with my attorney. (At this point Mr. Starkovich conferred with Mr. Hatten.)
>
> Mr. Starkovich: I have lived here a couple of years, approximately.

Mr. Tavenner: How many years?

Mr. Starkovich: A couple of years, approximately.

* * *

Mr. Tavenner: Where did you live in 1950?

Mr. Starkovich: That is the same question, isn't it? Or is it worded differently?

Mr. Tavenner: Just answer the question. Where did you live in 1950?

Mr. Starkovich: Same answer as previously stated.

* * *

Mr. Velde: Yes, the Chair concurs. You are directed to answer the question.

(At this point Mr. Starkovich conferred with Mr. Hatten.)

Mr. Starkovich: Under protest, because my attorney says that I can answer that question without infringing on my rights as an American, I will say that I was — I mean I was born in Bellingham, naturally, but I lived, as I can best remember, all of 1950 in Bellingham, Washington.

The preceding colloquy is unambiguous and warrants the conclusion that there was a waiver. The *Emspak* case, *supra*, still recognizes that proposition, even though the Court held in that case that no finding of waiver was warranted.

No case cited by appellant, nor a detailed search by appellee could be located that would establish a precedent for invoking the rule that appellant is urg-

ing on this Court, to the effect that anyone identified as a Communist is privileged under the Fifth Amendment to refuse to answer any question propounded to him by a Congressional Committee. Certainly a witness must answer all routine questions. For it must be pointed out that there is a definite distinction between a witness and a defendant. Obviously a defendant can refuse to be a witness and thereby refuse to answer *any* question, on the general principle that he need not be a witness against himself. While a witness, other than a defendant, may refuse to answer *only* those questions which tend to incriminate him.[1] To hold as the appellant argues would obliterate this distinction. The appellant was appearing before the Congressional Committee as a witness. Actually a witness before a Congressional Committee and one before a grand jury are certainly in different categories. This other distinction has not been commented on in the cases dealing with this point, but it is significant because several of the cases have gone to a considerable extent to sustain the privilege where the witness appeared before a grand jury. Certainly the apprehension of a witness before a grand jury would be greater than it would be before a Congressional

---

[1] For a scholarly discussion on this distinction note Justice Spence decision in *In re Lemon*, 59 P. 2d 213 (Cal. 1936).

ant for a federal crime. (Patricia) *Blau v. United States*, 340 U.S. 159 (1950)."

However, the Supreme Court does not stop there but continues with the following language:

> "But this protection *must* be confined to instances where the witness has *reasonable cause* to apprehend danger from a direct answer. *Mason v. United States*, 244 U.S. 362, 365 (1917), and cases cited. The witness *is not* exonerated from answering *merely* because he declares that in so doing he would incriminate himself — *his say-so does not* of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified. *Rogers v. United States*, 340 U.S. 367 (1951) * * * The trial judge in appraising the claim 'must be governed as much by his personal perceptions of the peculiarities of the case as by the facts actually in evidence.' See Taft, J., in *Ex parte Irvine*, 74 F. 954, 960 (C.C.S.D. Ohio, 1896). (Italics supplied).

The Supreme Court then looked at the "setting" and concluded that it was not perfectly clear that the answers could not possibly incriminate the petitioner.

In determining the possibility of incrimination the trial judge is in the best position to "size up" the situation and his decision should not be disturbed unless there is an abuse of discretion. In *Mason v. United States*, 244 U.S. 362, 366, the Court stated:

> "Ordinarily, he (the trial judge) is in a much better position to appreciate the essential facts than an appellate court can hold and he must be permitted to exercise some discretion, fructified

> by common sense, when dealing with this necessarily difficult subject. Unless there has been a distinct denial of a right guaranteed, we ought not to interfere."

This same determination by the court is referred to in *Rogers v. United States*, 340 U.S. 367, 374:

> "* * * As to each question to which a claim of privilege is directed, the court must determine whether the answer to that particular question would subject the witness to a 'real danger' of further incrimination."

See also *Heike v. United States*, 227 U.S. 131, 144, and *Brown v. Walker*, 161 U.S. 591, 600.

The trial court was cognizant of this rule throughout the trial below and gave the appellant the benefit of the doubt in each instance as indicated by the dismissal of Counts II through VI which contained some of the following questions: Count II—Did you travel abroad in 1950? Count III—I hand you a photostatic copy of a passport application issued November 6, 1950 and I will ask you to examine it and state whether or not the signature appearing on the second page is your signature. Count IV—Is the photograph appearing on the second page a photograph of you? Counts V and VI did not deal with specific questions.

On May 23, 1955 the Supreme Court decided *Quinn v. United States*, 349 U.S. 155; *Emspak v. United States*, 349 U.S. 190; *Bart v. United States*, 349

U.S. 219. All three of these cases arose out of hearings before the Committee on Un-American Activities of the House of Representatives. The appellant seems to base his entire argument on the holdings in these cases. What then do these cases specifically hold?

In the *Quinn* case, *supra*, the petitioner Quinn was called as a witness before the Committee after a witness by the name of Thomas J. Fitzpatrick. Fitzpatrick refused to answer certain questions on the basis of the First and Fifth Amendments. Quinn being subsequently called as a witness, refused to answer, adopting as his own grounds those relied upon by Fitzpatrick. The lower court held that a witness (Quinn) may not incorporate the position of another witness (Fitzpatrick). The Circuit Court reversed, holding however, that a witness can incorporate the position of another, but that the claim must be *clear*, and ordered a new trial for that determination. Quinn petitioned for certiorari from the order granting a new trial. Mr. Chief Justice Warren who wrote the majority opinions in all three cases stated in the Quinn case that—(1) the petitioner's references to Fitzpatrick's grounds were sufficient to invoke the privilege to a question concerning petitioner's membership in the Communist Party; (2) that "unless the witness is clearly apprised that the Committee demands his answer notwithstanding his objections, there can be

no conviction under Sec. 192 for refusal to answer that question" (language appearing at page 166 of the opinion). Those were the only two grounds for reversing the conviction, neither of which is involved in the instant case.

In the *Emspak* case, *supra*, the petitioner Emspak was asked 239 questions. He refused to answer 68 on the basis of the First and Fifth Amendments. Emspak was tried on all 68 refusals. Of those 68 questions, 58 related to whether or not the petitioner was acquainted with certain named individuals and whether or not those individuals had ever held official positions in the union; two questions dealt with alleged membership in Communist front organizations; and eight questions dealt with petitioner's alleged Communist Party membership and activity. The Government in that case conceded that all 68 questions were of an incriminating character. With that concession and with the nature of the questions propounded, together with the setting, where both Communist front organizations had previously been cited by the Committee as Communist-front organizations, and where each of the named individuals had previously been charged with having Communist affiliations, the Court held at page 201:

> "If an answer to a question may tend to be incriminatory, a witness is not deprived of the

> protection of the privilege merely because the witness, if subsequently prosecuted could perhaps refute any inference of guilt arising from the answer."

A second ground for reversing the conviction was announced by Mr. Chief Justice Warren to the effect that the Committee never overruled petitioner's objection based on the Fifth Amendment and never directed him to answer, therefore, "without such apprisal there is lacking the element of deliberateness necessary for a conviction under Section 192 for a refusal to answer." (Found at page 202.)

In the *Bart* case, *supra*, the petitioner Bart, when called before the Committee, was general manager of the Freedom of the Press Co., Inc., which publishes the Daily Worker, and of the Daily Worker itself, both being Communist Party organs. The District Court found petitioner guilty of eight counts (questions). The Circuit Court upheld the convictions as to five counts. Mr. Chief Justice Warren announced the issue before the Court at page 222:

> "Therefore, the issue before us is, upon the record as it stood at the completion of the hearing, *whether petitioner was apprised of the Committee's disposition of his objections.*"
>
> (Italics supplied.)

Bart's objections were pertinency and self-incrimination. At no time did the Committee directly over-

rule his objections, nor did it indirectly inform Bart of the Committee's position through a specific direction to answer. Mr. Chief Justice Warren stated at page 223:

> "Because of the consistent failure to advise the witness of the Committee's position as to his objections, petitioner was left to speculate about the risk of possible prosecution for contempt; he was not given a clear choice between standing on his objection and compliance with the Committee ruling. Because of this defect in *laying the foundation* for a prosecution under Section 192, petitioner's conviction cannot stand under the criteria set forth more fully in *Quinn v. United States, supra.*" (Italics supplied.)

None of the announced decisions are in conflict with the trial court's holding in the instant case, and actually they bolster the position because the Committee has the right to call witnesses before it and ask all but incriminating questions. As stated by Mr. Chief Justice Marshall in *United States v. Burr*, 25 Fed. Cas. 38, 39 (1807):

> "When two principles come in conflict with each other, the court must give them both a reasonable construction, *so as to preserve them both to a reasonable extent.* The principle which entitles the United States to the testimony of every citizen, and the principle by which every witness is privileged not to accuse himself, *can neither of them be entirely disregarded.*"
>
> (Italics supplied.)

Also in Wigmore, Vol. 8, Evidence, p. 317, wherein this privilege is discussed, he states:

> "In preserving the privilege, however, we must resolve not to give it more than its due significance. We are to respect it rationally for its merits, not worship it blindly as a fetish."

Had the Supreme Court in the *Quinn*, et al cases, announced that the Committee could not ask any questions of a witness properly before it, then and only then would these later three cases be authority for appellant's position. But the main proposition advanced is that the Committee must "lay the proper foundation" for prosecution under Section 192 and not leave the witness in the position of speculation as to his possible violation of the section.

The proper foundation was laid in the instant case as indicated by the following quotation from Plaintiff's Exhibit 1, page 6, (top) as it applied to the question under discussion:

> "Mr. Velde: You are directed to answer that question."

In fact the Committee uniformly directed the appellant to answer after each refusal.

The appeal in this case can well present the question: Can a witness refuse to even give his name and address, if called as a witness before a Congressional

Committee hearing if he claims the privilege? To sustain the appellant it would call for an affirmative answer to that question, and make Congressional hearings a useless and wasteful act.

CONCLUSION

Even though the decision in the lower court was arrived at on March 15, 1955 before the recent opinions of the Supreme Court of May 23, 1955, they are in harmony with each other and no basis appears in said recent opinions for reversing the conviction in the instant case, and the same should in all respects be affirmed.

Respectfully submitted,

CHARLES P. MORIARTY
United States Attorney

RICHARD D. HARRIS
Assistant United States Attorney